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HAROLD B. WILL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 894.

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA, for the Use of W. O. PELPHREY,
Respondent.

PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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vs.

UNITED STATES OF AMERICA, for the Use of W. O. PELPHREY,
Respondent.

PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PREFACE.

Come Edward E. Morgan Co., Inc., Jones & Gillis, Incorporated, and their sureties, United States Fidelity and Guaranty Company and Standard Accident Insurance Company, and move the court to grant them leave to file with

and present to this Honorable Court the accompanying petition for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit in Cause Number 15,650 on the docket of said court from the adverse judgment of said court affirming the judgment of the lower court (R. 263) on February 23, 1956, and finally denying a petition for rehearing (R. 284) therein on March 23, 1956, as set forth in the accompanying petition for said writ of certiorari; and show unto the court that said petition is meritorious and petitioners should be allowed to file and present the same to prevent a miscarriage of justice in this case.

PETITION FOR CERTIORARI.

The petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of Edward E. Morgan Co., Inc., et al., Appellants, v. United States of America for the Use of W. O. Pelphrey, Appellee, affirming the judgment of the United States District Court for the Western District of Texas, Waco Division, in said cause adverse to appellants (R. 263).

I.

The majority and dissenting opinion of the lower court is not yet reported, officially or unofficially, but a copy of both opinions appears in the appendix hereto.

II.

This suit arose under the Miller Act, 40 U. S. C. A., Sec. 270 (a) *et seq.* It is a suit by a subcontractor against the prime contractors and their surety on the statutory payment bond given by them in connection with a contract

for the construction of certain runways and facilities for a government air force base near Killeen, Texas. The petitioning contractors as defendants were clearly entitled to a peremptory instruction in the lower court under controlling decisions from the Supreme Court of Texas and from this court. The jury was not sufficiently instructed as to its duty in passing upon the intent and meaning of the phrase "cubic yard" in a letter-contract between the parties prepared by respondent to afford the jury any safe guide in its deliberations. Proper and necessary instructions requested by petitioners were refused by the court. A clear defense of accord and satisfaction was unmistakably established but was ignored by the court. In the interest of uniformity of decisions on important questions of Federal law which should be settled by this court and to prevent a complete departure from accepted and usual course of judicial proceedings, this court should grant a writ of certiorari to prevent a grave miscarriage of justice in this case.

(a) The judgment of the Court of Appeals was rendered and entered on February 23, 1956 (R. 263).

(b) On the 12th day of March, 1956 (within the twenty-one day period provided by Rule 29 of said court), a petition for rehearing was filed in the lower court. A copy thereof appears at Page 264 of the record. Said petition for rehearing was denied on the 23rd day of March, 1956 (R. 284).

(c) The power to review the judgment adverse to the petitioners is conferred by 28 U. S. C. A., Section 1254(1).

III.

The questions presented by this petition for review by this court are:

(1) The refusal of the lower court to give petitioners a peremptory instruction or directed verdict. That instruction should have been granted by the trial court for two reasons:

(a) The respondent produced no proof whatever to show that the parties intended on April 13, 1953, to measure this crushed stone by the cubic yard by loose truck measure. No evidence or inference on any evidence in this record authorized the court to submit that question to the jury or supports the finding of the jury for the respondent. All of the evidence and inferences would lead to the conclusion that if there were a meeting of the minds of these parties on that question that they intended that this crushed stone should be measured by the United States Engineers in place and that these Engineers' estimates under which petitioners were paid should be used as the basis for settlement with respondent except that respondent was to be paid for not less than 40,000 cubic yards (R. 14) although it was probable that the petitioners would not be paid for more than 30,500 cubic yards (R. 123, 179).

(b) The evidence conclusively showed that petitioners issued their check to respondent for $22,374.44 on August 27, 1953, on condition and with notations thereon to the effect that it was in full payment of this controversy in suit (R. 29), and said check was transmitted by letter of like tenor (R. 28). The petitioners refused to delete such notation from said check (R. 119-120); nevertheless, the respondent during the trial voluntarily endorsed said check to the clerk and caused the proceeds thereof to be deposited into the registry of the trial court (R. 120, 150, 210). Such incident was interposed as a defense and settlement of this suit (R. 184, 12, and 13) to no avail.

(2) The lower court refused to grant petitioners proper and sufficient instructions to the jury to enable them to understandingly discharge their duties. Those requests

for additional instructions refused by the trial court and affirmed by the Court of Appeals should have been given if this case were submitted to a jury. Legal rules governing their deliberations were not explained to the jury and the jury was thus allowed to grope in ignorance of such rules to the wholly untenable conclusion which was arbitrarily reached by them in this case.

(3) The trial court erroneously allowed the respondent over petitioners' repeated objections (R. 186, 187, 189, 193, 200) to offer testimony on the question of "custom and usage" in Texas to establish the intent and meaning of the contract in suit after both sides had concluded their testimony and as rebuttal without amending the complaint under the rules (R. 185). Such question of custom and usage thus belatedly injected as an afterthought became the controlling aspect of the case in determining by such devious means what the contracting parties intended by a contract which was made in Jackson, Mississippi, to be performed near Killeen, Texas, Mr. Morgan who accepted the proposal in Jackson (R. 146), said that he intended and the contract meant to measure the cubic yard of this material "in place" and not by loose truck measure (R. 146). Mr. Pelphrey, the other contracting party, never disputed Mr. Morgan's statement or said that the parties intended anything to the contrary on said date. Mr. Pelphrey did not testify on the question of custom and usage but elected to remain mute on that question. If respondent were to have been paid by the cubic yard in place for this material as the prime contractors were paid, as petitioners contend, then, admittedly, they owed him nothing. Long after April 13, 1953, the prime contractors made another contract with a man named Goetz (R. 181) wherein they expressly agreed to pay him for hauling this same material, and they paid Goetz for hauling 9,598 truck-

loads which were treated as containing five cubic yards each (R. 138). Respondent seized upon this fact under this subsequently made contract with a third party to contend that by this hauling contract that these contractors owed him for that same quantity of such material. Significantly, when the contract was made on the 13th day of April, 1953, it was actually contemplated that the material would be hauled in Euclids and not trucks at all. It was contemplated that the respondent might stockpile the material (R. 14-15). It was not until later that it was decided to hire Goetz to haul the material in his trucks (R. 181) and but for this later turn of events, the respondent would have had no evidence to support his claim as this record shows.

(4) The court on this special verdict of the jury awarded respondent a judgment for $30,325.33 with six percent interest thereon after July 24, 1953, to the date of judgment on March 24, 1955 (R. 218), and authorized an application thereto of the $22,374.44 monies in the registry of the court. If anything were due, the award of interest in this Miller Act case is controlled by Federal statute and such award is in contravention thereof under 28 U. S. C. A., Section 1961.

IV.

The respondent sued in this case under 40 U. S. C. A., Section 270(a), *et seq.*, known as the "Miller Act," to recover money allegedly due for crushed stone furnished petitioners who were prime contractors on a public job for the United States. The suit was filed within the statutory time and was based solely upon express terms of a letter-contract between the parties for mining and crushing Edwards limestone at $1.01 per cubic yard (R. 14). The petitioners plead and proved that only 34,030.66 cubic yards

of this crushed stone were furnished by the respondent according to United States Engineers' estimates and actual measurements of the material "in place" by the engineers and according to which measurement the petitioners themselves were paid by the United States (R. 152). The petitioners issued their checks to respondent for 40,000 cubic yards of this material as the minimum quantity fixed in the contract (R. 152). Respondent contended for 47,990 cubic yards and showed that petitioners had paid Goetz for hauling 9,598 truckloads which Goetz and the petitioners treated as containing five cubic yards per load for the purposes of their express contract to establish his (respondent's) claim for furnishing such quantity of said material (R. 138). Admittedly, the parties never had any understanding or agreement, express or implied, about this material other than is contained in the letter-contract (R. 131-132, 181). No agreement about truck measure, no inspection or effort was made to estimate truck measurement of this material for the purposes of the contract in suit, and no supervision of any kind was provided by either party for the loading of the material or to see that the trucks were fully loaded (R. 131-132). There was and is an absolute dearth of evidence or testimony in the record to show or even indicate that these parties ever agreed or intended in any manner that petitioners should pay for this material by "loose truck" measure. The minimum quantity (40,000 cubic yards) of this crushed rock is mentioned in the contract because the parties realized that there was a one-third shrinkage factor in the material in place (R. 132, 180).

When preparing this letter-proposal to the petitioners (R. 14), respondent knew that the United States Engineers in Item Four of their Information to Bidders (R. 65) had estimated that 30,500 cubic yards of this crushed stone would be needed to do this job (R. 123, 179). Respondent

furnished 34,030.66 cubic yards according to United States Engineers' estimates (R. 152) but he was paid by petitioners for 40,000 cubic yards with their said $22,374.22 check (R. 28). The respondent had the entire section of the specifications in hand in submitting his proposal to furnish this crushed rock (R. 71, 126) and these specifications showed that petitioners were to be paid for the material by the engineers' estimates in place (R. 82-83). Nevertheless, not a word was said by respondent to even indicate that he had in mind any other method of measurement of this material by the cubic yard other than "in place." At the conclusion of the petitioners' testimony, for the first time the respondent injected into the case the question of custom and usage in Texas (R. 185) over the petitioners' continuing objection (R. 186, 187, 189, 193, 200). No order was entered by the lower court authorizing the amendment which was subsequently made of the complaint (R. 6). The trial court submitted the case to the jury for a special verdict under Rule 49(a) (R. 215-216). It refused petitioners' request for a directed verdict (R. 213). It refused to give any instructions requested by the petitioners to guide the jury in its deliberations, although the petitioners were clearly and undeniably entitled thereto (R. 211-213). The lower court erroneously entered a judgment against the petitioners and their sureties on their payment bond for $30,325.33, together with six percent interest from July 24, 1953, and provided that the sum of $22,374.44 in the registry of the court as the proceeds from petitioners' check should be applied thereto and deducted from said principal award (R. 218). The United States Court of Appeals for the Fifth Circuit affirmed said judgment and denied a petition for rehearing. The attention of the court is directed to the fact that the petitioners clearly tendered their $22,374.44 check to respondent on condition that it be accepted and cashed in full settlement of this suit (R. 29). The peti-

tioners expressly declined to delete such provisions from their said check as the complaint itself expressly states (R. 119-120, 5), yet the respondent caused said check to be cashed under such circumstances and paid into the registry of the court and thereby effected an accord and satisfaction under all of the authorities.

V.

Jurisdiction was vested in the trial court in this case by 40 U. S. C. A., Section 270(b). It was a suit under this Federal statute against these contractors who constructed runways and other facilities for the United States at one of its very important and strategic air force bases. The questions involved in this case are of extreme importance to these petitioners as contractors and others about the country who are invited to bid competitively for work in Texas for the government. A jury in this case has been permitted to arbitrarily decide the case adversely to these nonresidents of Texas without a scintilla of evidence to support their conclusion. The lower court has failed to apply the rules of the applicable and controlling authorities to this case; and this court should intervene to correct such errors.

VI.

(A) The court erred in refusing to direct a verdict for the petitioners (R. 213) because:

1. There was not a scintilla of testimony to show that these parties intended on April 13, 1953 (R. 15), to measure this crushed stone by loose truck measure. The petitioners owed the respondent nothing if the crushed stone was to be measured by the United States Engineers in place (compacted) as petitioners contend was intended and as the testimony shows was their intent when the contract was made at Jackson, Mississippi. Respondent had Sec-

tion Four of the Specifications which showed how this material was to be measured by the cubic yard in place for payment to the prime contractor (R. 82-83), and he (respondent) had these data for the purpose of making this proposal to petitioners to furnish this material. Under such circumstances it is presumed as a matter of law that both parties intended to so measure this crushed stone or respondent would have otherwise stated in his proposal. Stated differently, in case of ambiguity in respondent's proposal, it should be given that meaning which he knew or had reason to know was in accordance with the understanding of the other party.[1] The authorities are legion to the effect that a plaintiff must produce more than a scintilla of evidence or suffer an adverse judgment.[2] The respondent's proposal itself shows that this material would be delivered to petitioners' hauling units known as Euclids which are not trucks (R. 14) (and not to Goetz' trucks) or it could have been stockpiled. Either of such alternative performances would have divested respondent of data gained from the performance by Goetz of a *subsequently made* hauling contract (R. 181) under which Goetz hauled 9,593 truckloads of this crushed stone under an express contract for which he was paid by petitioners at the rate of five cubic yards per load.

2. There was an accord and satisfaction by respondent voluntarily endorsing and delivering petitioners' $22,374.44 check to the clerk during the trial to cover into the registry of the court. This check was delivered on condition that it be accepted in full payment of the claim in suit. The letter of transmittal (R. 28) and the check itself clearly

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[1]17 C. J. S., Section 295, p. 695.

[2]*Pennsylvania Railroad* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 395.

so provided (R. 29). Petitioners refused to delete such inscription from the check as the complaint itself states (R. 5). The cases are myriad to the effect that such use of said check effected a full accord and satisfaction of the claim in suit.[3] That respondent intended to effect such legal result is conclusively presumed by reason of the necessary effect of his deliberate act. Every man is presumed to intend the natural and probable consequences of his own act.[4]

(B) The instructions of the lower court furnished no safe and dependable guide to the jury (R. 215-216) and failed to inform the jury of proper yardsticks for use in considering the case (R. 211-213). The case was submitted for special verdict under Rule 49(a), Civil Procedure. The court erroneously submitted a mixed question of law and fact (intent of the parties and meaning of the contract) in its charge to the jury[5] (R. 215). In the first place, this was clearly not a case for employment of the ill-favored special verdict under this rule. The jury was entitled to more explicit instructions to guide them in an understanding deliberation in the case (R. 212-213). The court should not have admitted any testimony of custom and usage over the petitioners' objections (R. 186, 187, 189, 193, 200). No fixed custom or established usage was proved sufficiently

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[3]*Chandler* v. *State Highway Board*, (5 C. A.) 61 F. 2d 601, 604; *J. Kahn & Co., Inc.*, v. *Clark, Attorney General*, (5 C. A.) 178 F. 2d 111, 114; *Autographic Register Co.* v. *Phillip Hand Co.*, (5 C. A.) 198 F. 2d 212, 213; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Heman Clark*, 178 U. S. 353, 20 S. Ct. 924; *Hemingway, Treas.*, v. *Stansell*, 106 U. S. 399, 1 S. Ct. 473.

[4]*Allen* v. *United States*, 164 U. S. 492, 17 S. Ct. 154, 155; 20 Am. Jur. 227, Section 232; 31 C. J. S. 750, Section 131; A. L. I., Torts, Section 531.

[5]*Kirby H. Jackson et al.* v. *C. E. King*, (5 C. A.) 223 F. 2d 714, 718.

to give rise to any presumption of intent of these parties on the date of the making of this contract.[6] The contract came into being by acceptance in Jackson, Mississippi, and Mr. Morgan who signed it (R. 15-16) said that he never had any notice or knowledge of any such alleged practice in Texas (R. 204). Mr. Pelphrey who sent the proposal to Mr. Morgan never testified but remained mute on that question. The suit, however, was on an express contract (R. 3-4) which was never changed (R. 131-132, 181). This testimony actually added nothing to respondent's case but obviously confused the jury. In the alternative, the court erred in overruling petitioners' motion for a judgment and new trial (R. 221). The respondent has induced the court unwittingly to make a contract for him which he could not have made with petitioners and then has enforced it for him.

The untimely and improper receipt of testimony on custom and usage to effectually amend the contract in suit

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[5]Custom must be plead and clearly proved. *Albert* v. *Farnsworth*, (5 C. C. A.) 176 F. 2d 198.

Usage must be shown so generally that it would be unreasonable to show parties ignorant of it. 55 Am. Jur. 285, Section 25.

Custom to be binding by implication must be so universal as to be conclusively presumed a part of the contract. 55 Am. Jur. 269, Section 7.

Courts look with disfavor on doctrine of custom and usage. Actual knowledge or usage so general that parties presumed to have acted on it must be shown. 20 Am. Jur. 311, Section 333; *Meridian Star* v. *Kay*, 52 So. 2d (Miss.) 35; *Whitfield Transportation Co.* v. *Border Truck Lines*, 271 So. 2d 706, 708. Citing 5 Tex. Jur., pp. 1025-1026, Section 15, and 55 Am. Jur. 283, Sections 21 and 22.

Usage in Texas could not affect contract made in Mississippi. *Insurance Co. of North America* v. *Hibernia Insurance Co. of New Orleans*, 140 U. S. 565, 11 S. Ct. 909, 911.

and the erroneous and inadequate instructions of the court[7] were potent and controlling incidents which resulted prejudicially to the petitioners' hurt and constitute such a departure by the lower court from established precedent as to call for an exercise by this court of its power of review and supervision.

(C) The court in this case has allowed interest on this judgment from a date prior to the date of the judgment in contravention of 28 U. S. C. A., Section 1961. The matter of the allowance of interest in this suit based on a Federal statute is a substantial Federal question and not a local one.

The propriety of this award of interest prior to the date of this judgment in contravention of this statute presents a substantial and important Federal question not previously determined by this court and justifying certiorari in this case.[8]

This Honorable Court should review this case and correct and vacate such unjust decision and rectify such miscarriage of justice. The dissent in this case by a peerless lawyer and erudite scholar of the law alone should convince this Honorable Court that petitioners' case should be reviewed here in the exercise of a sound judicial discretion.

Premises Considered, the petitioners pray that upon a full consideration of this case by this Honorable Court that it may please the court to order the issuance of a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit in this case; and petitioners pray

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[7]The court must instruct a jury as to rules of law and protect parties from unjust verdicts. *Pleasants* v. *Fant*, 22 Wall. U. S. 116, 121 (excerpt in appendix); *Paramount Film Dist. Co.* v. *Applebaum*, (5 C. A.) 217 F. 2d 101.

[8]*Brooklyn Savings Bank* v. *O'Neal*, 324 U. S. 697, 65 S. Ct. 895, 906.

that this Honorable Court will reverse the judgment of the lower court in this case and remand the case to the United States Court of Appeals for the Fifth Circuit with directions to vacate its judgment in this case and to enter a judgment reversing the judgment of the lower court and entering a judgment for petitioners as appellants therein; or in the alternative that the case be reversed and remanded to the lower court for trial anew under proper directions of this Honorable Court.

Most respectfully submitted,

WILLIAM HAROLD COX,
1109-10 Deposit Guaranty Bank Building,
Jackson (1), Mississippi,
Attorney for Petitioners.

CERTIFICATE.

I certify as attorney of record for the petitioners in the above-styled and numbered cause in this court that I have this day mailed by air mail, postage pre-paid, to Peeler Williams, Jr., Esquire, 404 Liberty Building, Waco, Texas, and J. W. Crosland, Esquire, 1100 Republic National Bank Building, Dallas, Texas, attorneys of record for the respondent, at their said proper post-office addresses, a true copy of the foregoing Petition for Certiorari in this case.

This April 20, A. D., 1956.

WILLIAM HAROLD COX,
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Jackson (1), Mississippi,
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